ESSO PRODUCTION MALAYSIA INC

v.

MAIMUNAH AHMAD & ANOR

COURT OF APPEAL, KUALA LUMPUR
HAIDAR MOHD NOOR FCJ
MOKHTAR SIDIN JCA
ABDUL KADIR SULAIMAN JCA
[CIVIL APPEAL NO: W-04-88-97]
2 NOVEMBER 2001

LABOUR LAW: *Employment - Dismissal - Criminal charges - Charges did not state time, date and place of alleged offences - Whether charges rendered void ab initio for want of material particulars - Whether finding of guilt by internal board of inquiry could not stand - Whether dismissal without just cause and excuse*

The first respondent was dismissed from employment by the appellant after the appellant's board of inquiry proved two charges made against her. The matter was referred to the second respondent wherein an award was granted to the first respondent. The appellant's application to the High Court for an order of *certiorari* to quash the award was dismissed by the learned judge. Hence, the appellant's appeal.

Held:
Per Abdul Kadir Sulaiman JCA

[1] The dismissal of the first respondent by the appellant was based on the findings of the internal board of inquiry that both charges against the first respondent had been proved. So, the validity or otherwise of the charges put before the internal board of inquiry was the pivotal issue herein. The issue being one of law, the learned judge was correct when he said that it could be raised at any stage of the proceedings in the matter. (pp 247 h & 248 a)

[2] The charges were criminal or at least semi-criminal in nature, the consequence of which deprived the first respondent of her livelihood with her dismissal from employment. Hence, the substance relating to the two charges could not be brushed aside as being of no significance. (p 248 b-c)

[3] The first respondent admitted and did not dispute the charges during the domestic inquiry or during the proceedings before the second respondent. However, the date, time and place the offences were alleged to have been committed were not known to enable proper charges to be framed against her. (p 248 c-d)

[4] The burden was on the party that made the allegations to satisfy the tribunal adjudicating the matter that the charges had been proved before the first respondent could be condemned. There were material particulars required to be disclosed in the charges. Without those particulars, one accused upon the charges would not be able to prepare proper defences to them. (p 248 d-e)

[5] Although the charges were admitted and not disputed by the second respondent, that did not entitle the learned judge to proceed to consider the merits of the case. The validity or otherwise of the charges was the threshold of the matter before the merits could be considered. (p 248 e-f)

[6] The charges were bad in law and the learned judge was correct when he said that such charges for want of material particulars were *void ab initio.* Therefore, on such improper charges before the board of inquiry the finding of guilt upon the first respondent could not stand thereby rendering the dismissal of the first respondent by the appellant to be without just cause and excuse. Accordingly, the dismissal of the application for *certiorari* by the learned judge was justified and it followed that the merits in dismissing the application need not be looked into. (pp 248 f-g, 249 h & 250 a)

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden pertama telah diberhentikan daripada pekerjaan oleh perayu selepas Lembaga Siasatan perayu mendapati dua pertuduhan yang dikenakan ke atas beliau terbukti. Perkara tersebut telah dirujuk kepada responden kedua di mana satu award telah diberikan kepada responden pertama. Permohonan perayu kepada Mahkamah Tinggi untuk satu perintah *certiorari* untuk membatalkan award tersebut telah ditolak oleh hakim yang bijaksana. Oleh itu, menyebabkan rayuan oleh perayu.

Diputuskan:
Oleh Abdul Kadir Sulaiman HMR

[1] Pemecatan responden pertama oleh perayu adalah berdasarkan keputusan Lembaga Siasatan dalaman bahawa kedua-dua pertuduhan terhadap responden pertama telah terbukti. Oleh itu, keesahan atau sebaliknya mengenai pertuduhan-pertuduhan yang dikemukakan di hadapan Lembaga Siasatan tersebut merupakan isu penting di sini. Isu tersebut yang merupakan isu undang-undang, maka hakim yang bijaksana adalah betul apabila beliau mengatakan bahawa ianya boleh dibangkitkan pada mana-mana peringkat prosiding dalam perkara tersebut.

[2] Pertuduhan-pertuduhan tersebut bersifat jenayah sekurang-kurangnya atau sebahagian jenayah, akibatnya telah melucut responden pertama daripada pendapatan sara hidup beliau apabila beliau dipecat daripada pekerjaannya. Oleh itu, substans berkaitan dengan kedua-dua pertuduhan tersebut tidak boleh diketepikan sebagai tidak penting.

[3] Responden pertama mengakui dan tidak mempertikaikan pertuduhan-pertuduhan tersebut ketika siasatan domestik atau ketika prosiding di hadapan responden kedua. Walaubagaimanapun, tarikh, masa dan tempat kesalahan-kesalahan tersebut didakwa telah dilakukan tidak diketahui bagi membolekan pertuduhan-pertuduhan sempurna dibuat terhadap beliau.

[4] Bebanan adalah terletak pada pihak yang membuat pendakwaan untuk memenuhi tribunal yang menghakimi perkara tersebut bahawa pertuduhan-pertuduhan tersebut telah terbukti sebelum responden pertama dijatuhkan hukuman. Terdapat perkara-perkata material yang perlu didedahkan dalam pertuduhan-pertuduhan tersebut. Tanpa butir-butir tersebut, seseorang yang dituduh atas pertuduhan-pertuduhan tersebut tidak akan dapat menyediakan pembelaan yang sempurna.

[5] Walaupun pertuduhan-pertuduhan tersebut diakui dan tidak dipertikaikan oleh responden kedua, itu tidak memberikan hak kepada hakim yang bijaksana untuk meneruskan bagi menimbang merit-merit kes tersebut. Keesahan atau sebaliknya pertuduhan-pertuduhan tersebut adalah ambang perkara tersebut sebelum merit-merit boleh dipertimbangkan.

[6] Pertuduhan-pertuduhan tersebut adalah tidak sempurna di sisi undang-undang dan hakim yang bijaksana adalah betul ketika beliau menyatakan bahawa pertuduhan-pertuduhan yang sedemikian kerana ketiadaan butir-butir material adalah *void ab initio*. Oleh itu, atas pertuduhan-pertuduhan tidak sempurna yang sedemikian di hadapan Lembaga Siasatan, keputusan bersalah ke atas responden pertama tidak boleh dikekalkan dan dengan itu menjadikan pemecatan responden pertama oleh perayu tanpa alasan dan sebab yang adil. Sehubungan itu, penolakan permohonan untuk *certiorari* oleh hakim yang bijaksana adalah wajar dan diikuti bahawa merit-merit di dalam menolak permohonan tersebut tidak perlu diberikan perhatian.

[Rayuan ditolak.]

Case(s) referred to:
Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 2 MLJ 129 ***(refd)***
Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan [1997] 1 CLJ 665 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1), (3)

For the appellant - Andrew TC Saw (Edward Saw); M/s Ng Yook Woon, Andrew TC Saw & Co
For the respondents - LG Seah (Adele Chin); M/s Lobo & Assoc

[Appeal from High Court, Kuala Lumpur; Originating Motion No: R-25-71-1997]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Kadir Sulaiman JCA:
This is an appeal from the decision of the High Court dismissing the application of the appellant for *certiorari* to quash the award of the second respondent, Mahkamah Perusahaan Malaysia, No. 132 of 1997 dated 25 March 1997. The said award arose out of a reference made by the Minister of Human Resources, Malaysia under s. 20(3) of the Industrial Relations Act 1967 relating to the dismissal of the first respondent, Maimunah bte Ahmad, by the appellant, effective from 26 March 1992.

According to the term of the award, "It is the court's decision that from the totality of the evidence adduced the company (the appellant here) only based on suspicion and speculation to charge the claimant (the first respondent here) and as such their decision to dismiss the claimant was totally baseless without just cause and excuse".

The events leading to the dismissal of the first respondent by the appellant, are that following an internal investigation carried out, the first respondent was made to appear before the appellant's board of inquiry on 11 and 12 February 1992 on two charges as follows:

> 1. That you received $400.00 from Aladdin bin Mohd. Hashim, knowing that this sum was part of the money received from Company's contractors, Oilfield Resources Sdn. Bhd. or its representatives in return for assistance rendered in relation to payment of that contractor's invoice in contravention of the Company's Gift and Entertainment Policy and the Conflict of Interest Policy.
>
> 2. That you concealed and failed to disclose to the Company's Management, the existence of irregular business practices and/or violation by employee and/or yourself, of the above-mentioned Company's policies.

The internal board of inquiry after a hearing found both charges against the first respondent proved. Following that, by a letter dated 26 March 1992, the appellant informed the first respondent that the management "views the gravity of your misconduct very seriously and after due consideration, has decided to terminate your employment with the company with immediate effect".

Before the High Court, in support of the application for *certiorari*, the appellant based its grounds on rejection of certain evidence and wrong application of the burden of proof by the second respondent, and on a jurisdictional error committed in the course of the hearing before it leading to the making of the award.

The learned judge in disposing the matter, gathered from his grounds of judgment, after laying out the facts of the case made comment on the charges meted out against the first respondent before the domestic inquiry. Having said that the two charges are criminal or semi-criminal in nature, the learned judge went on:

> To come back to the two charges proffered against the 1st Respondent, they did not contain the particulars of date, time and place the offences were alleged to have been committed. They are material particulars which must be stated in the charges.
>
> It is trite law that in a criminal or quasi-criminal charge, the burden of proof is always placed on the prosecution or the party that alleges. And as I had said earlier, it is also the duty of the prosecution to frame a charge and ensure all the material particulars including date, time and place of the alleged offence are contained in the charge. In other words on the wordings of the charge as framed, the 1st Respondent would be able to know exactly when the alleged offences were committed by her. The Applicant (the appellant here) could not and must not assume that the 1st Respondent knew all the particulars in respect of the charges. As regard the two charges proffered against the 1st Respondent the Applicant failed to state the date, time and place the offence was alleged to have been committed by the 1st Respondent. The failure of stating such material particulars would render the charges bad. It must be pointed that in a criminal or quasi-criminal case defects to the charge may be raised at any level of hearing. That the defect was not raised during the hearing at the lower Court or tribunal does not prevent the matter from being raised at the higher level. As I have said it is the duty of the prosecution to frame a proper charge. The fact that the accused had not raised it at the original hearing of the Domestic Inquiry would not validate the defective charge. A defective charge for want of material particulars is *void ab initio*. On such improper charges the finding of guilt of the 1st Respondent by the Board of Inquiry should be set aside thereby rendering the dismissal of the 1st Respondent unlawful.

Before us, the learned counsel for the appellant contends that this issue was irrelevant for the learned judge to consider because the first respondent admitted and did not dispute either during the domestic inquiry or during the proceedings before the second respondent that she had received RM400 in the form of a cheque from Haji Aladdin which she cashed and therefore, the merits should be considered. We do not think that we could agree with the contention of the learned counsel. The issue here is whether the first respondent in the first place was dismissed by the appellant on 26 March 1992 with just cause or excuse. If it is, the award of the second respondent cannot stand. Section 20(1) of the Act states:

> Where a workman, irrespective of whether he is a member of a trade union of workman or otherwise, considers that he has been dismissed without just cause or excuse by his employer, he may make representations in writing to the Director General to be reinstated in his former employment; ... .

In the present case of the first respondent, this provisions of the Act was invoked leading to the matter being placed before the second respondent. For the appellant, to justify the dismissal, it is settled law that the burden is on it to satisfy the tribunal empowered to adjudicate the matter that such dismissal was with just cause or excuse. It is not for the first respondent to prove otherwise. See *Goon Kwee Phoy v. J & P Coats (M) Bhd.* [1981] 2 MLJ 129 where at p. 136 Raja Azlan Shah CJ (Malaya) (as His Highness then was) said:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of the court to determine whether the termination or dismissal is with or without just cause or excuse. If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the employer or find one for it.

That case cited clearly laid down the principle that in an enquiry pursuant to s. 20 of the Act, the burden is upon an employer to satisfy the court that the dismissal of its workman is with just cause or excuse. In the present appeal before us, it cannot be disputed that the dismissal of the first respondent by the appellant was based on the findings of the internal board of inquiry that both charges as mentioned earlier preferred against the first respondent had been proved. For that reason alone the first respondent was dismissed by the appellant.

So, the validity or otherwise of the charges put before the internal board of inquiry is the pivotal issue in this matter. The issue being one of law, the learned judge is correct when he said that it could be raised at any stage of the proceedings in the matter. Looking at the two charges labeled against the first respondent during the inquiry leading to the findings of the board resulting in the dismissal of the first respondent by the appellant, they are indeed criminal or at least semi-criminal in nature, the consequence of which would deprive the first respondent of her right to livelihood as indeed had happened to her by being dismissed from her employment with the appellant: see *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1997] 1 CLJ 665. Hence the substance relating to the two charges cannot be brushed aside as being of no significance. Taking the words of the learned counsel for the appellant in his submission that the first respondent admitted and did not dispute either during the domestic inquiry or during the proceedings before the second respondent that she had received the money and cashed it, and there was also in the evidence that there was a statement recorded from her during the investigation stage. At least from the purported statement surely the date, time and place the offences alleged to have been committed would have been known to enable proper charges be framed against her. On the two charges, the burden is on the party that alleges to satisfy the tribunal adjudicating the matter that the charges had been proved before the first respondent could be condemned. They are material particulars required to be disclosed in the charges. Without that, how would one accused upon the charges be able to prepare proper defences to them. Simply upon the admission and non-dispute either during the domestic inquiry or during the proceedings before the second respondent would not entitle the learned judge of the High Court in this instant, to proceed to consider the merits of the case. The validity or otherwise of the charges is the threshold of the matter before the merit could be considered. Looking at the two charges as they stood, we would not hesitate to say that they are bad and the learned judge was therefore, correct when he said that such charges for want of the material particulars is *void ab initio*. With that we agree with the learned judge that on such improper charges before the board of inquiry the finding of guilt upon the first respondent could not stand thereby rendering the dismissal of the first respondent by the appellant to be without just cause or excuse and therefore, unlawful. On this ground alone, this appeal of the appellant against the decision of the learned judge ought to be dismissed.

In the proceedings before the second respondent resulting in the impugned award, as the issue of the defective charges was never an issue, the second respondent decided the matter on the merits based on the evidence tendered before him. At p. 14 of the impugned award, the second respondent said:

> It is the Court's decision that from the totality of the evidence adduced the Company (the appellant before us) only based on suspicion and speculations to charge the Claimant (the first respondent before us) and as such their decision to dismiss the Claimant was totally baseless without just cause and excuse. As such the Claimant is entitled to claim backwages from the date of her dismissal dated 26.3.1992 to the last date of hearing 10.10.1999.

It is against this decision in the impugned award that led to the *certiorari* proceedings before the learned judge initiated by the appellant. Before dealing with the merits of the application in the *certiorari* proceedings the learned judge from his grounds of judgment has this to say at p. 4 thereof:

> Before I proceed to consider the merits of this application I cannot help but to comment on the charges made by the applicant against the 1st Respondent. Needless to say these charges are criminal or semi-criminal in nature. It is a basic requirement that in a criminal or semi-criminal charge it must contain the date, time and place the offence was alleged to have taken place. These are material particulars to be contained in the charge in order to enable the accused person to prepare his Defence adequately. Without stating the particulars of date, time and place the accused person is put in a prejudicial position to prepare his Defence and answer the charge properly. It is therefore mandatory that those material particulars are stated without which the charge is bad and on such reason alone the accused person can be discharged or acquitted of the charge. On an appeal, a finding of guilt by a lower Court or Tribunal based on a defective charge for want of material particulars, can reverse the finding of guilt of the lower Court and acquit the accused. It is therefore of utmost important that such charges are properly framed so that all the material particulars are stated in the charge.

To this statement of the learned judge, we agree. The two charges against the first respondent here are clearly bad for lacking in the material particulars. A proper tribunal having to decide on such bad charges would not have come to the conclusion arrived at by the board of inquiry of the appellant. But its findings are to the contrary. Upon these erroneous findings, the appellant acted to dismiss the first respondent from her employment effective from 26 March 1992. Since this is the reason put forward by the appellant for dismissing the first respondent, it is clearly without any just cause and excuse, which would disentitle the appellant to the order of *certiorari* sought before the learned judge. Though the reasons for dismissing the applications were based on void charges and on the merits, the dismissal of the application for *certiorari* was justified.

For the reason given above, we need not look into the merits to find fault with the findings of the learned judge in dismissing the application. On the ground of defective charges which found the basis for the dismissal of the first respondent, we dismiss this appeal of the appellant with costs. The decision of the learned judge is affirmed. Deposits to the first respondent to the account of taxed costs.